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BSkyB/Sky Italy and Sky Deutschland—almost done and dusted? All thanks to Ms Murphy perhaps?

Posted on [July 25, 2014](#) by [aandreangeli](#)

When the news that BSkyB was in talks with NewsCorp got to the headlines a few months ago, one could have been forgiven for thinking that we had gone back to June 2010... that was when NewsCorp had made its own bid to buy the 61% of the shares in BSkyB, thus acquiring full control on several key media outlets, only to drop it nearly a year later, given regulatory criticism and public opinion opposition. Come May 2014, it all looked as though it was going to work the other way around: BSkyB declared to have open talks (which are in their “early stages”) with a view to acquiring from Mr Murdoch or, to be more precise, from its 21st Century Fox, control over the Italian and the German arms of Sky (see: https://corporate.sky.com/media/press_releases/2014/statement_on_potential_acquisition). So, the roles are reversed, in as much as Mr Murdoch is the target and not the pursuer in this new race.

Many possible explanations have been given as potential causes for BSkyB’s move; commenting on the Daily Telegraph (see: <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10825535/Sky-Europe-what-is-behind-BSkyBs-effort-to-buy-Murdochs-European-pay-TV-businesses.html>), Christopher Williams suggested that this bid may be prompted by “fairly simple matters of scale and efficiency”; he argued that BSkyB is very likely to see in the acquisition a way into a market which unlike the British one, is not at “saturation point” yet and gives the company room to grow. Commenting on the Guardian, John Plunkett (see: <http://www.theguardian.com/media/2014/may/12/bskyb-talks-germany-italy-pay-tv-rupert-murdoch>) cited similar concerns for boosting efficiency and for aiming to boost shareholders’ value via the “consolidation” of Sky’s TV business into a multinational pay-TV group. He stressed that this concern was not new, but one that had already been aired in July 2013 by James Murdoch: in an interview, Mr Murdoch had indicated that consolidation should be a “long term goal” for the family business, by saying that “clearly the situation [was] not optimal” and that, consequently, a degree of “fresh thinking” was required (see: <http://www.theguardian.com/media/2013/jul/25/james-murdoch-sky-europe>). Come as it may, news of the talks were met with mixed reactions on the financial markets, with BSkyB’s shares taking a 2% tumble and observers sounding divided as to the assessment of the costs and benefits of a similar possible change (see: <http://www.independent.co.uk/news/business/news/bskyb-confirms-talks-to-buy-sky-italia-and-sky-deutschland-9355532.html>). In its corporate statement of 14 May, the company confirmed that an “approach” had been made to 21st century Fox “to evaluate the potential acquisition of its pay TV assets in Germany and Italy”; however, it made clear that whatever talks, they were at a “preliminary stage” and that, perhaps most tellingly, Board discussions on these issues were conducted within an inner circle made of independent directors of BSkyB, to the exclusion of those directors that had connections with 21st Century Fox.

Today, both British and European (such as the Italian Corriere della Sera) reported that BSkyB and Fox had agreed on the terms of a merger between the former, controlled by Rupert Murdoch’s 21st Century via a majority stake, and Sky Italia and Sky Deutschland (see: <http://www.theguardian.com/business/2014/jul/25/bskyb-buy-sky-italia-deutschland-fox>; and also: http://www.corriere.it/economia/14_luglio_25/bskyb-compra-sky-italia-nasce-pay-tv-multinazionale-europea-e396f28c-13c6-11e4-9950-e546b7448c47.shtml): according to the report by the Guardian’s Juliette Garside, this operation is likely to “bring together 60 million customers in the three richest European economies”; it is also going to net Fox close to \$7 bn.

bring together 20 million customers in the three richest European economies ; it is also going to net Fox close to \$/ bn, providing all the minority shareholders of Sky Deutschland sell up. And finally, in an extremely wide-ranging change of BSkyB's corporate make-up, the merger will also bring the National Geographic Channel within the Fox's "TV family".

When news of the talks emerged, it was queried whether reasons of efficiency, including the concern for securing economies of scale and scope across Europe were the only possible explanations for BSkyB's projected move. It was widely acknowledged that the pay-TV market on the Continent was rather appealing to a company who faces tough competition in the UK and Ireland and could therefore be well justified in looking at new areas where expansion is still a viable proposition. Yet, it is equally undeniable that, even absent the merger, BSkyB has been doing rather well in attracting new customers for both its TV channels and its ISP services' products. For instance, according to, again, the Guardian, the last quarter for which data are available saw 50,000 new UK customers signing up to Sky broadband packages and 76,000 taking up its payTV services.

However, taking into account James Murdoch's declarations back in July 2013, according to which a need seemed to be felt at corporate and board level to "sort out" the pay-TV strategy across Europe it may be wondered whether the 2011 preliminary ruling in *Murphy* (case C-403/08 and 429/08, [2011] ECR I-9159) may have anything to do with these plans of consolidation...

It may be recalled that, according to the EU Court of Justice, it is against the right to free movement of services and the principles enshrined in Article 101 TFEU to prevent the holder of a TV decoder card purchased anywhere in the EU from using the same device in a different Member State in order to receive, subject to limitations aimed at protecting the integrity of IP rights potentially affected by these practices, broadcasts of live football matches (see *Murphy*, para. 96-100, 115-117). The Court acknowledged that the basic principles of freedom of movement and of competition could be limited with a view to protecting the "specific subject matter" of an IP right: however, it held that an exclusive license agreement obliging "(...) the broadcaster not to supply decoding devices enabling access to that right holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement (...)" would be disproportionate to that aim, on the ground that it would have eliminated all competition among providers of the same services in the areas of the single market on which it had taken effect (see para. 139, 142-144 and 146). The ruling was met with dismay by the holders of the rights to broadcast football matches on pay-TV platforms: it was suggested that by remaining faithful to the imperative of the single market, *Murphy* had in fact marked the end of absolute territorial protection in the field of sports broadcasting, since it prevented licence-holders from relying on their exclusivity in order to exclude rival broadcasters and thereby extract a "premium fee" from their licensees (see especially para. 107-109) Internal market advocates, on their part, could not be more pleased: not only could the rules on free movement of services be relied on in order to allow decoder card holders to use their devices, for all intents and purposes, anywhere in the Union; broadcasters were also constrained in the size of the licence fee they could charge—according to the Court of Justice, the "specific subject matter" of their right only allowed them to extract a

“reasonable remuneration”, that is a fee that could only reflect “the actual economic value” of the service they offered.

The scope of the ruling was however somehow tempered by the need, also acknowledged by the Court of Justice, to maintain in place effective safeguards for any “creative work” that could have been affected by these broadcasts; as was forcefully held in the preliminary ruling, not all the “components” of the broadcast could be shown across the single market as allowed by the ruling (see para. 152 ff.). Certain “elements” of it should have been effaced, if the broadcast took place outwith the territory for which the license had originally been granted, on the ground that they represented the outcome of their author’s intellectual and creative endeavour and consequently fell within the “specific subject matter” of IP rights granted within that territory (Murphy, para. 156-157; see also case C-5/08, Infopaq, [2009] ECR I-6059, para. 39, 45-46). ON that basis, the English courts saw a number of claims for copyright infringement being brought by either BSkyB, as the licensee of broadcasting rights from the Premier League, or by the FAPL against pub landlords or tenants who held foreign decoder cards and had not in actual fact “effaced” the broadcast they showed (especially on public premises) from the “proprietary elements”. (see e.g. FAPL v Luxton; for a report, <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25968200>).

However, it is plain to see that relying on IP litigation in order to forestall the “economically undesirable” effects of the 2011 preliminary ruling is not ideal for licensees who cannot prevent the transmission of the matches’ images, unless in doing so the person responsible for it had infringed the “subject matter” of their copyright.

Against this background, it may legitimately be queried whether an alternative, less resource-intensive strategy could have been found to limit the “damage” inflicted to Sky in the UK especially by the application of Article 101 TFEU arrived at in the Murphy case. A careful look at the EU acquis seems to point to another solution—again, in the way in which Article 101 has been read by the CJEU! It is in fact clear from this acquis that this provision can only apply when “two or more undertakings”, that is entities carrying out independently an economic activity are concerned; in other words, Article 101 cannot apply to what is commonly called “single firm conduct” which, in light of existing precedent of the EU Court of Justice, also encompasses certain forms of “intra-group practices”, i.e. commercial arrangements designed to regulate the reciprocal relations between members of the same corporate group. As was held in, inter alia, the Ahmed Saeed ruling, Article 101 TFEU would not apply to behaviour imputable to a subsidiary which, in the context of a wider corporate group and especially in its relations with its parent company, did not enjoy any “real freedom to determine its course of action on the market” (Case C-66/86, [1989] ECR I-803, para. 35). Consequently, this provision would not catch “(...) agreements or concerted practices between undertakings belonging to the same concern (...), if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings (...)” (case 30/87, Bodson, 1988] ECR 2479, para. 12). The assessment of the degree of independence enjoyed by the subsidiary would have to take into account the “nature of the relationship” between the members of each corporate group and especially the extent to which they pursue the same “commercial strategy”, as determined by the parent company or companies within that group. (para. 13).

Against this background, one could legitimately wonder whether the merger between BSkyB, Sky Italia and Sky Deutschland could have been motivated by the concern for forestalling the impact that the preliminary ruling in Murphy had had on the licensing strategies and practices that the broadcaster had deployed, especially in as much as sports broadcasting had been concerned; in other words, it may be suggested that thanks to the merger restrictions on inter alia the “free movement of decoder cards” or on the geographic reach of licenses, as well as the right to reap a “premium” on profits made in jurisdictions where the Premier League matches’ broadcasts are seen as very popular and therefore prized, may become immune from Article 101 TFEU scrutiny (see also, mutatis mutandis, the General Court’s decision re: Viho Europe, T-112-92, [1995] ECR II-17). Seen in this light, it could therefore be argued that these and other arrangements would not longer be regarded as restraining the freedom to trade and compete enjoyed by independent companies, but as mechanisms for the allocation of tasks to different part of the same “economic entity”, that is this new “international payTV” (see the leader on La Repubblica at: <http://www.repubblica.it/economia/2014/07/25/news/sky-92352319/?ref=HRER2-1>).

At this stage it is difficult to predict the shape of the post-merger scenario, if only because, due to its geographic reach and its financial implications, this transaction is going to have to be notified to the EU Commission under the 2004 EU Merger Regulation. In an allied context to that of merger review at Union level, and thanks to the “legitimate interests” clause of Article 21(4) of the Regulation, domestic media regulators are very likely to conduct a careful scrutiny of the consequences of the merger for media plurality in their respective jurisdictions.

From a competition law and policy standpoint, it should be emphasised that any ex ante control on the proposed

concentration is not going to be the “last word” on its compliance with a system of genuine and undistorted competition. As the CJEU forcefully stated in *Viho*, any “unilateral conduct” such as that at issue in that specific case would not have escaped scrutiny in light of Article 102 TFEU, provided that the condition for the application of that provision—especially as regards the existence of a position of market power on the part of the “corporate entity”. Consequently, it could be expected that, if the group seen as a unitary entity enjoyed significant market power, conduct designed, for instance to apply “different conditions to equivalent transactions” or to discriminate customers on the basis of, *inter alia*, their geographic location, or, more generally, to “limit markets”, it would held liable for an infringement of this provision (see e.g., *mutatis mutandis* case 27/76, *United Brands Company v Commission*, [1978] ECR 207, especially paras. 157-160).

As was highlighted by several media outlets, BSkyB, in its post-merger configuration, is likely to “swallow” a significant slice of the European market for payTV and ISP services; according to Juliette Garside from the Guardian, “(...) The acquisition will double Sky’s customer base from 11.5m in the UK to 20m when it includes Germany, Austria, Switzerland and Italy; and will increase group revenues from £7.6bn to £11.2bn. (...)” (see: <http://www.theguardian.com/business/2014/jul/25/bskyb-buy-sky-italia-deutschland-fox>). Yet, it is an open question, at this stage, whether this is going to amount to having a dominant position on rather extensive and diverse geographic markets. Yet, one cannot help but wonder whether Ms Murphy’s victory for pub landlords and tenants as well as for football mad EU citizens may have had a part in BSkyB bid for such an important and wide-ranging concentration which, as things now stand, may appear to be perhaps the only way in which the status quo of “national licenses” can be restored. At this stage, one cannot do much more than sit on the sofa, with a big bag of popcorn eagerly waiting for the next instalment of this long-running saga.

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